NO. 89-439

In the

Supreme Court of the United States

OCTOBER TERM, 1989

DAVIS OIL COMPANY, ET AL,
Petitioners

versus

WILLIAM P. MILLS, ET AL,
Respondents

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENTS

WARREN D. RUSH
Rush, Rush & Calogero
2014 W. Pinhook Road, Suite 901
Post Office Box 53713
Lafayette, Louisiana, 70505
Telephone: (318) 235-2425

COUNSEL OF RECORD
FOR RESPONDENTS
William P. Mills, III,
John L. Robertson, Brenda Sue
Harmon Robertson, Orel Bridges, Jr.,
Ethyl Sue Hoffpauir Bridges

A B Letter Service, Inc., 327 Chartres St., New Orleans, La. (504) 581-5555

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QUESTIONS PRESENTED

Respondents in Opposition to Petition for Writ of Certiorari desire to add the following to the Questions Presented in the Petition for Writ of Certiorari:

2) Whether the original lessee, Louisiana Land Management and its assignee, Davis Oil Company, and its assignees, Exxon Corporation, Grace Petroleum Corporation, NWT Natural Resources Company, Saturn Energy Company, Vale and Company and Allen E. Paulson's identity, address and mineral lease interest in the property foreclosed upon was "reasonably ascertainable" from a search of the conveyance Records of Lafayette Parish, Louisiana?

3) Whether the foreclosing creditor, the First National Bank of Lafayette, Louisiana, or the Sheriff of Lafayette Parish, Louisiana undertook "reasonably diligent efforts" to identify and provide notice to Louisiana Land Management and its assignee, Davis Oil Company and its assignees, Exxon Corporation, Grace Petroleum Corporation, NWT Natural Resources Company, Saturn Energy Company, Vale and Company and Allen E. Paulson?

LIST OF INTERESTED PARTIES

Respondent concurs with the List of Interested Parties in the Petition for Writ of Certiorari and desires to add the following interested party:

David C. Kimmel, assistant to
William J. Guste, Jr. as the
Attorney General of the State
of Louisiana.

and desires to delete from Petitioner's List of Interested Parties:

Paul B. David, Esq.

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RESPONDENTS' OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Respondents do not disagree with Petitioners' Brief on Writ of Certiorari with respect to Opinions Below; Jurisdiction; and Constitutional and Statutory Provisions Involved. However, in Respondents' view, Petitioner has omitted one party and failed to delete another party from the List of Interested Parties. Further, Petitioner has in Respondents' opinion, misstated several of the Questions Presented and has failed to state certain facts in the Statement of the Case.

STATEMENT OF THE CASE

Respondents concur with the Statement of the Case as presented in the Petition for Writ of Certiorari however, desire to add the following to same.

Despite the fact that the Collateral Mortgage affecting the Subject Lands was of public record and clearly predated the Subject Lease, neither Louisiana Land Management, Inc. nor Davis Oil Company, Inc. obtained, nor tried to obtain, a subordination of the Collateral Mortgage to the Subject Lease.

On August 27, 1984, some three months after the sheriff's sale of the Subject Lands to First National Bank and over two months after the recordation of the sheriff's deed to First National Bank, Davis assigned the majority of its interest in the subject Lease to Exxon Corporation, Grace Petroleum Corporation, NWT Natural Resources Company, Saturn Energy Company, Vale and Company, and Allen E. Paulson. The majority of these assignments were not recorded until Noverber 28, 1984. NWT Natural Resources Company and Allen E. Paulson subsequently conveyed their interests to Davis Oil Company on May 31, 1985 and November 7, 1985, respectively. Grace Petroleum Corporation conveyed its interests to Exxon. These latter three assignments occurred many months after the recordation of the act of sale of the Subject Lands from First National Bank to Mills. The entities who hold assigments are the plaintiffs in this action.

By virtue of well-settled Louisiana law, the sheriff's May 30, 1984 sale of the Subject Lands to First National Bank, Lafayette, extinguished the Subject Lease. Because the Subject Lease and the various assignments recorded pursuant to it constituted a cloud on the Mills Group's title to the Subject Lands, the Mills Group made written demand on Davis Oil Company, NWT Natural Resources Company, Allen E. Paulson, Vale and Company, Grace Petroleum Corporation, Saturn Energy Company, and Exxon Corporation (the "Assignees") for a recordable release of the Subject Lease to evidence that it was no longer in force.

The Assignees of the Subject Lease responded by filing the instant suit, an action for declaratory judgment and equitable relief, against the Mills Group, First National Bank, Upton, the Sheriff of Lafayette Parish, Louisiana, and William Guste, Attorney General of the State of Louisiana.

SUMMARY OF ARGUMET: REASONS THE COURT SHOULD NOT GRANT A WRIT OF CERTIORARI

There is no question that economic turmoil has gripped the oil producing states and especially Louisiana. Yet this is not a reason for this Honorable Court to grant Petitioners' Writ of Certiorari. Davis Oil Company was very experienced in the oil and gas industry and had special knowledge that its oil, gas and mineral lease was not subordinated to a prior recorded mortgage, and that there was a distinct possibility that a judicial sale in foreclosure proceedings could occur at any time prior to subordination being obtained, in which case, the oil, gas and mineral lease owned by Petitioners would be lost. Davis Oil Company, a sophisticated oil company, was admittedly willing to take the risk of not obtaining a subordination of the foreclosing bank's mortgage and cannot now claim that failure of Plaintiff in the foreclosure proceeding to give actual notice to the mineral lessees constitutes a violation of the Due Process Clause. Further, no state or federal court has ever required a plaintiff in a foreclosure proceeding (or the Sheriff conducting same) to examine title to the subject property being foreclosed upon or to make a mineral search or discover mineral leases, which are of record, and then serve notice of such foreclosure proceeding upon such interested parties.

I. CONSTRUCTIVE NOTICE WAS CONSTITUTIONALLY ADEQUATE

The analytical process implicated by a due process claim is well-established. The party claiming the protection of the clause must demonstrate that he was deprived of a constitutionally protected right, i.e., life, liberty or property. Only if it is determined that such a deprivation occurred such that due process applies, the question remains, what process is due. *See Morrisy v. Brewer,* 408 U.S. 471, 481, 92 S.Ct. 2593, 2600, 33 L.Ed. 2d, 484 (1972).

With regard to the establishment of a cognizable interest protected by the due process clause of the constitution, the Supreme Court has observed the following:

> Property interests, of course, are not created by the constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law - rules or understandings that secure certain benefits and that support certain claims of entitlement to those benefits.

Board of Regents v. Roth, 408 U.S. 564, 577, 92 S.Ct. 2701, 2709, 33 L.Ed. 2d 548 (1972). The hallmark of property, the high court has emphasized, is an individual entitlement grounded in state law, which cannot be removed except "for cause'. *Logan v. Zimmerman Brush Company,* 455 U.S. 422, 430, 102 S.Ct. 1148, 1155, 71 L.Ed. 2d 265 (1982).

The constitutionally required examination of Louisiana law reveals that neither Davis nor the Assignees were "deprived" of any legally protected property interest. The nature of a "lease" as an encumbrance on property is governed by Louisiana's public records doctrine, a concept

deeply embedded in Louisiana jurisprudence. *See e.g. McDuffie v. Walker,* 125 La. 152, 51 So. 100 (1909).

The lease as an encumbrance on property and the rights of the lessee to continue possession are, in a sense, conditional. The lessee possesses no legally protectable right to continued possession of the leased premises once the premises are sold in satisfaction of a debt secured by a previously recorded mortgage. *See T.D. Bickham v. Hebert,* 432 So. 2d 228, 230 (La. 1983). Thus, when such a foreclosure occurs, and the lease is "terminated" by operation of law, the due process clause is not triggered since the lessee is not "deprived" of anything. The lessee's right being conditional, the foreclosure "does not take away something which previously existed." *Cf. Bond v. Dentzer,* 494 F. 2d 302, 307 (2d Cir. 1974).

That the termination of a right consistent with its limitations does not work a "deprivation" such as to trigger the due process clause is best evidenced by *Federal Deposit Insurance Corporation v. Morrison,* 747 F.2d 610 (11 Cir. 1984), *cert. denied,* 106 S.Ct. 568, 88 L.Ed. 2d 553 (1985). There, the plaintiff filed suit to obtain a deficiency judgment against a mortgagor. Prior to the foreclosure, the mortgagor had deeded his ownership interest to a third party, but retained his rights and obligations as a mortgagor. Because the plaintiff had not provided notice of the foreclosure to the defendant mortgagor, the defendant argued that the plaintiff was prevented from obtaining a deficiency judgment because of a violation of the due process clause of the constitution.

The court held in no uncertain terms that the foreclosure by the plaintiff, which terminated the defendant's equity of redemption, did not involve the due process clause because the foreclosure did not "deprive" the

defendant of his equity, but merely terminated it.

Likewise, the Assignees in the instant case, including Davis, suffered no deprivation and consequently were not entitled to due process. First National Bank's foreclosure within the contractual terms and requirements of Louisiana law did not deprive them of their interest in the Subject Lease, "but only terminated it." 747 F.2d at 615. Their right of possession existed only in the absence of foreclosure. *See T.D. Bickham v. Hebert, supra.* Because the Assignees lost nothing by the mere fact that First National Bank foreclosed on the property within the contractual terms and requirements of Louisiana law, they suffered no deprivation and consequently were not entitled to due process. 747 F. 2d at 616.

In an apparent attempt to invoke the holding of *Bonner v. D-W Utilitites, Inc.,* 452 F.Supp. 1295 (D.C. La. 1978), the Assignees allege that their interest in the Subject Lands was that of a "third party possessor" under Louisiana law. A third party possessor is one who purchases property subject to a mortgage but does not assume the obligations or binds himself personally for the satisfaction of the mortgage. La. Code of Civ. P. art. 2722; *LaCour v. Crais,* 367 So. 2d 1203 (La. App. 4th Cir. 1978). A third party possessor is someone other than a lessee, trespassor, or one having only physical possession of the property. *In re: Union Central Life Insurance Company,* 23 So.2d 63 (1945). In fact, under Louisiana law, mineral lessees, even though the "owner" of a real right, cannot be "third party" possessors because their possession is precarious *for* their lessors. The mineral lessor and lessee "bear a special relationship to each other" such that neither is regarded as in possession adverse to the other. *Trinidad Petroleum Company v. Pioneer Natural Gas Company,* 381 So.2d 808, 812, (La. 1980). *See* also *Smith v. West Virginia Oil and Gas*

Company, 373 So.2d 493 (La. 1979). Thus, the Assignees are not "third party possessors", and their attempt to invoke the holding of *Bonner* by suggesting otherwise is to no avail.

Assuming arguendo that the Sheriff's sale of the Subject Lands to First National Bank involved state action and worked a deprivation of a legally protected property right such as to trigger the due process clause, the next analytical step in evaluating the Assignees' claim of lack of due process is to determine the constitutional adequacy of the notice given prior to the Sheriff's sale. The seminal case of *Mullane v. Central Hanover Bank and Trust Company*, 339 U.S. 306, 314, 70 S.Ct. 652, 657, 94 L.Ed. 865 (1950), held that due process requires "notice *reasonably calculated*, under all the circumstances, to apprise interested parties of the pendency of the action and to afford them an opportunity to present their objections." More recently, the Supreme Court, in *Mennonite Board of Missions v. Adams*, 462 U.S. 791, 798, 103 S.Ct. 2706, 2711, 77 L.Ed. 180 (1983) reaffirmed its committment to the "reasonability" feature of the *Mullane* analysis.

The Second Circuit Court of Appeals observed the following regarding *Mullane* and *Mennonite*'

> The basic flexibility of the *Mullane* standard has not been discarded. . . A faithful application of both *Mullane* and *Mennonite* requires us to consider whether, under all the pertinent circumstances, it is reasonable to expect the city to have identified the names of the decedent's distributees. Whether such identification is reasonably to be expected depends not only on the burden the city would have to undertake but also the likelihood that the names would be brought to the city's attention without undertak-

> ing such burden . . . The initial determination of what obligation due process imposes must take into account what the interested party, or someone obligated to act on his behalf, is likely to do. An inquiry into reasonableness normally entails the weighing of interest; a heavy burden to ascertain and name may be "reasonable" to undertake if the likelihood that the person will otherwise receive notice is very low, and a lighter burden may not be "reasonably" required if it is highly likely that actual notice will otherwise occur.

Bender v. City of Rochester, New York, 765 F.2d 7, 11 (2nd Cir. 1985). The Court went on to apply the "flexible" due process requirement of "reasonable" notice, as articulated by the Supreme Court in *Mullane* and *Mennonite,* to determine whether the due process clause was satisfied by the defendants' mailing notice of a tax foreclosure proceeding addressed to the person listed in the conveyance records as the owner of the property involved, but who was in fact deceased, or whether the due process clause required the city to identify and give notice to each of the deceased person's heirs.

In holding that the due process clause did not require the city to give notice to the heirs, the Court noted that identification of the heirs would have been "a task beyond a routine examination of land records," and, while not "an onerous one", would "normally be performed by a competent title searcher in connection with the sale of the property."765 F.2d at 11. Addressing the second phase of the "reasonableness" inquiry, the Court found it "entirely reasonable" to assume that the administrator of an estate, pursuant to his fiduciary obligations, will make some effort to obtain mail sent to his decedent", and, at the very least, "inform the heirs of the pending proceeding so that they

can protect their interests". Furthermore, the Court noted that the administrator and the heirs were in "privity" such that notice to one should be imputed to the other. 765 F.2d at 12 N.8. Finally, the court observed that it was "reasonable" to assume that the administrator would inform the heirs because of the administrator's own self-interest in doing so:

> Unlike a mortgagee who will not learn of the contents of his mortgagor's mail unless the mortgagor chooses to inform him, an administrator will always, if he is fulfilling his legal duties, take steps to receive the decedent's mail, learn of proceedings pending against the decedent's property, and inform the decedent's heirs of those proceedings. Moreover, unlike a mortgagor who has failed to protect his own interests in mortgaged property and who has no incentive to inform his mortgagee of a pending foreclosure sale, the administrator is legally obligated to preserve the decedent's assets and, in order to protect himself from liability for breach of fiduciary duty, to inform the heirs of pending proceedings.

765 F.2d at 12. The Court then held that the mailing of a notice of tax foreclosure proceedings to the person listed on the land records as the owner of real property satisfied the due process clause because it was "reasonably calculated" to apprise the heirs of the owner of the pendency of the tax foreclosure proceedings.

II. NOT REASONABLY ASCERTAINABLE

Applying the *Mullane* and *Mennonite* "reasonability" test to the facts of this case leads to the conclusion that the notice procedures utilized in connection with the Sheriff's sale satisfied the constitutional minimums of the

due process clause. Upton received personal notice of the seizure of the Subject Lands, and newspaper notices were published advertising the pending Sheriff's sale. Like the administrator and his heirs in *Bender,* Upton and his lessee were in "privity" such that notice to one should be imputed to the other. *See 1B Moore's Federal Practice* §0.411[12] at 499-500. *See also Mid-Continent Broadcasting v. Dresser Industries,* 669 F.2d 564, 567 (8th Cir. 1982) (lessor and lessee have such a close relationship that it borders on "mere identity"). Moreover, the lessor, who has a legal duty "to cause the lessee to be in a peaceable possession of the thing during the continuance of the lease", has an incentive to inform his lessee of the pending foreclosure sale. *See* La. Civ. Code art. 2692, 2696, 2704. Assuming that the lessee has a "property interest" in the leased premises, the lessor has an additional incentive to inform his lessee of the pending foreclosure sale in that it would be to the lessor-mortgagor's best interest to have as many bidders at the foreclosure sale as possible so that his liability to his mortgagee for a deficiency judgment will be minimized.[1]

Turning to the second phase of the "reasonability" inquiry, the procedures utilized in the Sheriff's sale satisfied the due process clause in that the names and addresses of Davis and the other Assignees were not "reasonably ascertainable" such that personal notice to them was constitutionally required. *See Mennonite Board of Mission v. Adams, supra,* 103 S.Ct. at 2712. While an examination of the land records could have revealed the existence of the lease by Upton to Louisiana Land Management, and the subsequent assignment of that lease to Davis, a somewhat more than routine examination" would

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[1] In fact, there is an implicit suggestion in the Assignees' Complaint that notice to one party is notice to that party's privities because the Assignees only complain of lack of notice to Davis, their Assignor.

have been required to discover the existence of the assignment from Louisiana Land Management to Davis.[2] Such an examination would be in the nature of a title abstract "normally performed by a competent title searcher in connection with the sale of property." *See Bender v. City of Rochester, New York, supra,* at p. 11.

As shown from the assignments in the record from the various interested parties, there are numerous transactions which a party would be required to examine and interpret if notice were intended to be given to all parties having an interest in the subject lease, minerals and/or royalties, and if the Court ever adopted a rule that such notice were in fact required, an undue burden would be placed upon the prior mortgage holder who in effect would have to prepare an abstract of the records of the Clerk of Court's office in the parish where the property is located. If one transaction were misinterpreted or omitted, the entire proceedings would be open to attack, which obviously would place an undue burden on the prior mortgage holder, when in truth and in fact, the obligation is now and always has been on the holder of the subsequently recorded lease, who could protect himself by obtaining a subordination and/or monitor the foreclosure proceedings duly published as required by law to protect the interest of lessees or lessees' assigns.

In fact, an examination of the conveyance records would not have revealed the existence of the assignments, and subsequent notice could not have been given to the Assignees. The assignments occurred after the execution and recordation of the Sheriff's deed. Therefore, the

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[2] While the Assignees allege that First National Bank was aware of the existence of the Subject Lease and its assignment to Davis prior to the Sheriff's sale of the Subject Lands, that fact is specifically denied.

assignments were not of record at the time of the Sheriff's sale.

Moreover, the fact that the Sheriff's deed and its recordation pre-dated the assignments gave rise to an additional notice to the Assignees: notice on the public records. As the Louisiana Supreme Court observed:

> The third party in dealing with property is charged with knowledge revealed by the recorded instruments affectiong the property. *Wells v. Joseph*, 234 La. 780, 101 So.2d 667; *Wise v. Watkins*, 222 La. 493, 62 So.2d 653; *Otis v. Texas Company*, 153 La. 384, 96 so. 1. In the *Wise* case this court said with reference to a similar situation: "The defendants [herein, the plaintiff] cannot single out a single one instrument on the public records and disregard the other instruments . . . the records as a whole must be taken into consideration and they are bound by what they reveal" [222 La. 493, 62 So.2d 656]

Blevins v. Manufacturers' Record Publishing Company, 235 La. 708, 105 So.2d 392, 416 (La. 1958)(on original hearing).

> All persons are held to have constructive notice of the existence and contents of recorded instruments affecting immovable property and where a recorded instsrument has language that fairly puts a third person "on inquiry as to the title and he does not avail himself of the means and facilities at hand to obtain knowledge of the true facts he is to be considered as having bought at his own risk and peril." *Wells v. Joseph*, 234 La. 780, 101 So.2d 667, 670 (La.1958); *Judice-Henry-May Agency, Inc. v. Franklin*, 376 So.2d 991, 992-993 (La.App. 1st Cir. 1979); *Brown v.*

Johnson, 11 So.2d 713, 715-716 (La.App. 2nd Cir. 1942).

Florida Gas Exploration v. Bank of St. Charles and Trust, *supra*, at p. 538. Because the existence of the Sheriff's deed, with its legal effect of terminating the subject lease, was a matter of public record, the Assignees had constructive notice of the Sheriff's sale and can only be "considered as having bought at their own risk and peril."

In fact, the termination of the Subject Lease by the Sheriff's sale is a "risk" that was specifically assumed by Davis through Louisiana Land Management, Inc., the original lessee which took the subject Lease at the direction of Davis (hereinafter referred to as "Louisiana Land"). Louisiana Land is a corporation, the principal shareholder of which is Edward James Dauterive. Mr. Dauterive testified in his deposition taken on April 2, 1986 that his company furnished on behalf of its client complete land services.

Davis Oil Company, the assignee for whom the Subject Lease was taken by Louisiana Land, has a specific form entitled "Davis Oil Company Lease Purchase Report" which, according to Mr. Dauterive, is completed at the time a lease broker approaches a prospective lessor to obtain a lease, which such form has a specific blank for the completion of information relative to "Mortgages, Deeds of Trust, etc.:" and immediately thereunder, "Subordination Obtained:". Mr. Dauterive indicates in his deposition that this form was completed when the Subject Lease was procured by Louisiana Land and that no information relative to prior recorded mortgages was requested or obtained.

However, Michelle Prince (a lease broker for the original lessee, Louisiana Land Management) and Dauterive testified that, despite awareness of the risk in-

volved, subordinations were not obtained prior to the drilling of a successful well because it was too time-consuming and costly.

When requested by their customers, Louisiana Land does obtain subordinations, and admitted that it generally does not have much difficulty in doing so. Since the institution of this cause of action arising from the failure to obtain a subordination of the prior recorded mortgage held by First National Bank to the Subject Lease, Louisiana Land with the concurrence of Davis Oil has elected to modify its office procedure relative to prior recorded mortgages.

The Assignees should not be heard to complain now about the termination of the Subject Lease when they could have obtained a subordination of the Collateral Mortgage to the Subject Lease, but made the business decision not to. Once again, they must "take the bitter with the sweet".

The due process clause only requires notice "reasonably calculated" to apprise one with a protected interest of a pending deprivation. The reasonability *vel non* of notice procedures is "flexible" and depends upon the facts and circumstances of a given case. When the facts of this case are examined, the reasonability of the procedures utilized in the Sheriff's sale is manifest. Thus, while it is specifically disputed that any process was due these Assignees at all in connection with the Sheriff's sale, the process that was provided was more than sufficient to satisfy the due process clause.

First National Bank sold the Subject Lands to the Mills group long after the Sheriff's sale and after the Sub-

ject Lease was terminated by operation of law. The Assignees attempt to revive the Subject Lease by asking that the Mills Group be divested of the Subject Lands. Yet, the Assignees have not lodged one serious complaint against the Mills Group. In fact, the Assignees could not do so because the Mills Group was totally uninvolved in provoking the Sheriff's sale. The only pertinent time with which the Court could be concerned under the Public Records Doctrine is the time of the purchase of the subject property by William P. Mills, III, et al, from First National Bank of Lafayette. In this connection the purchasers, William P. Mills, III, et al, stated very clearly that when the subject property was acquired by them on February 12, 1985, they were of the belief that the Sheriff's sale of the subject property, which occurred on May 30, 1984, had effectively cancelled and erased from the records of the Lafayette Parish Recorder's Office that certain purported oil, gas and mineral lease executed by Kenneth D. Upton dated November 3, 1983, in favor of Louisiana Land Management, Inc., as well as any assignments pertaining thereto. Moreover, it is inconsequential given the fact that the Mills Group had no involvement in the Sheriff's sale. If the Assignees have alleged facts sufficient to establish a due process claim, that claim is only against those who were involved in the alleged due process violation - Upton, First National Bank and the Sheriff.

III. DAVIS FAILED TO USE REASONABLE DILIGENCE BY FAILING TO FILE NOTICE

In arriving at a conclusion as to whether constructive notice is reasonable under the circumstances one must approach the issue armed only with the knowledge the seizing creditor had at the time it initiated the proceedings, not what has been subsequently brought to light.

First National Bank as found by the trial court did not know that Upton granted a mineral lease affecting the Subject Land. The record contains the deposition of Ms. Joan Broussard, an employee of the Clerk of Court's office, who has also worked as an oil and gas landman and an abstractor. Her deposition provided ample and uncontroverted evidence that while a review of the Conveyance Records should disclose the existence of a mineral lease, it would not serve as a basis for a determination of the validity or viability of such a lease, and that a complete oil and gas title examination would be necessary to do so.

As the trial Court in this case correctly found:

> "... the status of a mineral lease cannot be determined from the conveyance records. The viability of a mineral leasehold hinges on payment of rents and production history. Reference to records containing this information is clearly beyond the routine examination of land records envisioned in *Mennonite* . . ."

Consequently, the question in this case is whether a seizing creditor should be required to spend the time and money to make a search of all pertinent records in an attempt to determine whether or not mineral interests had been granted on the subject Land and if so, examine the mineral title to identify persons with viable interests. Such a requirement would be overly burdensome where, as in this case, the seizing creditor has no indication that such interests have been granted at the time of the seizure and sale. This is particularly true in view of the fact that La. R.S. 13:3886 provides a simple, convenient and inexpensive means by which those persons can insure that they are given actual notice of any seizure.

As the trial Court reasoned in its Memorandum Ruling:

> " . . .Absent knowledge of the existence of a mineral lease, First National Bank of Lafayette was not constitutionally required to blindly search conveyance records for those interests. The availability of R.S. 13:3886, and the expectation that an interested party might employ it, contribute to a determination that constructive notice was reasonable. Although a conveyance records search would have accurately apprised First National Bank of Lafayette of Davis' interest in this case, the ambiguous character of these records does not make a recorded mineral interest 'very easily' ascertainable as defined in *Schroeder*, 371 U.S. at 212-13, 83 S.Ct. at 282. . ."

The trial court's factual determination that Davis' identity as an interested person was not very easily ascertainable reflects the proper weighing of factors that must be used when determining what is reasonable under the circumstances. The trial court weighed First National Bank's lack of knowledge of any mineral interest, the ambiguous character of the conveyance records, the fact that the viability of a mineral interest cannot be determined from the conveyance records, the time and difficulty involved in such a search and the likelihood that an interested person would have taken advantage of the provisions of La. R.S. 13:3886. Taking those factors, i.e., the circumstances, into consideration, the trial court properly found that constructive notice was sufficient in this case to satisfy due process concerns. Consequently, even if Davis was entitled to notice under the provisions of the Fourteenth Amendment, the publication done in accordance with Louisiana law was reasonable, under the circumstances.

Davis, et al. would have this court overrule the trial court and the U.S. Fifth Circuit Court of Appeals well-considered determination because the mineral lease in this case could have been located had the conveyance records been searched and on its face the lease appeared to be in its primary term. Davis' approach begs the question. *Mullane* and its progeny dictate notice reasonably calculated, under all the circumstances, to apprise interested parties whose identity is known or very easily ascertainable.

The circumstances in this case did not include First National Bank's knowledge of Davis' interest or the mineral lease. Due to the time, expense and difficulty that would be involved in a search of the ambiguous conveyance records, it is unreasonably burdensome to require that First National Bank conduct such a search when it had no indication that any such interest existed and where it was likely that any persons with such an interest would take steps to insure that they get notice as provided in La. R.S. 13:3886. Both lower courts' determination in this regard is eminently correct and should not be overrruled.

The unavoidable effect of a ruling by this Court that First National Bank should have examined the conveyance records, discovered the existence of the Subject Lease and the assignment thereof to Davis, and should have given actual notice to Davis, is that foreclosing creditors must determine the existence of and notify all of the owners of any interest in an oil, gas and mineral lease burdening the property being foreclosed upon. The obvious question then is: Where does the duty stop; both from the standpoint of determining the mineral ownership in potential lessors and from the standpoint of determining the ultimate ownership of the leasehold interest. A further result of such a holding would be that an entire seizure and sale could be overturned if a single owner of a fractional mineral interest, no

matter how small, was overlooked.

An affidavit executed by Ronald C. Reaux, a Lafayette Parish abstractor, was filed into the record to demonstrate that neither the original lessee, Louisiana Land Management, Inc., nor its assignees who had an interest in the subject oil, gas and mineral lease executed by Kenneth D. Upton, as lessor in favor of Louisiana Land Management, Inc., as lessee, dated November 3, 1983, and recorded under File No. 83-041444, Lafayette Parish Recorder's Office, i.e., Davis Oil Company, or any other party, through the date of the Sheriff's sale of the subject property which was held on May 30, 1984, had filed with the Lafayette Parish Recorder's Office a request for "'notice of seizure."

L.R.S. 13:3886, (added by Acts 1982, No. 615, Section 1), provides as follows:

> §3886. Request for notice of seizure on specific property; notification by sheriff; failure to notify
>
> A. Any person desiring to be notified in the event specific immovable property is seized shall file a request for notice of seizure in the mortgage records of the parish where the immovable property is located. The request for notice of seizure shall state the legal description of the immovable property, the owner of the property, and the name and address of the person desiring notice of seizure. The person desiring notice of seizure shall pay the sum of ten dollars to the sheriff, for deposit in the sheriffs' general fund, to defray the cost of providing the notice of seizure in the event said property is seized.

B. In the event of seizure of immovable property, the sheriff shall request from the clerk of court, or the recorder of mortgages for the parish of Orleans, a mortgage certificate at least twenty-one days prior to the sheriff's sale. The mortgage certificate shall include any requests for notice of seizure. Upon receipt of the mortgage certificate the sheriff shall notify, at least ten days prior to the sheriff's sale, those persons requesting notice of the seizure. The notice of seizure shall be by certified mail or actual delivery and shall include the name and address of the seizing creditor, the method of seizure and the sum owed, and the date of the sheriff's sale.

C. Neither the clerk of court nor the sheriff, or any of their officers, agents, or employees, shall be held liable if a reasonable attempt has been made to mail or deliver the notice to the address provided in the request.

D. The failure of the sheriff to notify a person requesting notice of seizure shall not affect the rights of the seizing creditor nor invalidate the sheriff's sale.

It is obvious that in addition to the protection afforded to a lessee who obtains a subordination of a lease to a prior recorded mortgage, a lessee can, under the laws of the State of Louisiana, require that notice of the impending Sheriff's sale be given to an interested party, including a lessee, by simply following the procedure outlined in L.R.S. 13:3886.

The failure of the lessee and its assigns to avail themselves of the authorized procedure precludes such parties from now complaining that they were not notified of the foreclosure proceedings filed by First National Bank of

Lafayette in the proceedings entitled "First National Bank of Lafayette versus American Rental Tools, Inc. and Kenneth D. Upton", bearing Civil Docket Number 84-2157 of the Fifteenth Judicial District Court in and for the parish of Lafayette, Louisiana, and certainly, it defeats any argument made that the laws of the State of Louisiana which do not require notice to lessees of foreclosures on prior recorded mortgages are unconstitutional.

This statute was interpreted by the Hon. Tom Stagg, Judge, United States District Court for the Western District of Louisiana, Shreveport Division, in the case entitled *Mid-State Homes, Inc. v. Eddie Belle Portis, et al*, 652 F.Supp. 640 (W.D. La. 1987). The court held that Louisiana Revised Statute 13:3886 cures any defects in the constructive notice provisions of the Louisiana Code of Civil Procedure. [Actually, the facts in the *Mid-State Homes* case are more favorable to the Petitioners in the Mid-State Homes case than they are in the present case since the *Mid-State Homes* case involves an inferior lien] which would normally appear on the certificate of non-mortgage ordered by the Sheriff handling the seizure and thus the Sheriff and seizing creditor would be aware of the inferior lien prior to the date of the Sheriff's sale. Neither a mineral lease nor subsequent assignments of fractional interests therein appear on the certificate of non-mortgage obtained by the Sheriff in a judicial sale.

An oil and gas lease is filed in the *conveyance* records and does not appear on certificates of non-mortgage, but rather to discover the existence of same would require a title search by an abstractor or attorney having experience in mineral and real estate law. Such an extra effort has never been required of a seizing creditor in any case decided in either federal or state courts. La. R.S. 13:3886 however is the remedy provided for parties wishing notice of a Sheriff's sale, and if not complied with, the interested party

adversely affected by a particular judicial sale cannot successfully argue that the constructive notice provisions of the Louisiana Code of Civil Procedure are unconstitutional under the *Mullane* and *Mennonite* cases analysed by Judge Stagg. In any event, if the constitutional requirements imposed by the *Mullane* and *Mennonite* cases referred to by Judge Stagg in the *Mid-State Homes, Inc.* case were satisfied by the procedure provided in La. R.S. 13:3886, this statute will most certainly satisfy the same constitutional requirements if in fact imposed in a case where an oil, gas and mineral lease is involved which is not set forth on the certificate of non-mortgage as is the case of an inferior lien recorded subsequent to the seizing creditor's mortgage.

CONCLUSION

Succinctly stated, the issue is—is a plaintiff in a foreclosure proceeding filed under a writ of fieri facias or the Sheriff of the parish in which such foreclosure takes place required to examine title to the property being foreclosed upon to determine if any oil, gas and mineral leases have been executed by the judgment debtor subsequent to the mortgage recognized in such judgment but prior to the seizure of such property. Many Clerks of Court do not furnish certificates of conveyance and are not legally required to do so; however, certificates of non-mortgage reflecting liens and encumbrances are issued in connection with foreclosure sales only in the names of the defendants who are being foreclosed on. Such certificates do not reflect oil, gas and mineral leases. If the Court were to require a title search by either the seizing creditor or the Sheriff in cases such as the above, it will be the first time that such an onerous obligation is placed upon such parties by legislation or judicial interpretation of a constitutional requirement, and it is obvious that the certainty of the validity of existing Sheriff's deeds would result in chaos and

turmoil for third parties attempting to determine the validity of land titles, especially in cases such as the present, where the oil, gas and mineral lease originally executed was assigned and then re-assigned in numerous fractions to a number of parties, all as is reflected by copies of the numerous assignments of fractional interests of the subject mineral lease in the present case filed into the record below.

The present case is certainly not factually favorable to Davis Oil Company inasmuch as it was very experienced in the oil and gas industry and had special knowledge that if an oil, gas and mineral lease was not subordinated to a prior recorded mortgage, there was a distinct possibility that a judicial sale in foreclosure proceedings could occur at any time prior to a subordination being taken, in which case, the oil, gas and mineral lease would be lost. Witnesses testified that they were well aware of the danger of not obtaining a subordination, *but that Davis Oil Company was willing to take the risk.*

All of the arguments concerning facts and circumstances of the sale of the subject property from First National Bank of Lafayette, the foreclosing creditor, to Mills, et al over eight (8) months subsequent to the Sheriff's sale cannot change the legal issue of whether the sale was valid on the day of the sheriff's sale, and accordingly, such arguments simply distract the Court from the primary issue in the case. No fraud has been alleged or suggested, and the depositions of Charles W. Marter, B. Floyd Yount and Michael Mudge filed into the record clearly indicate that the foreclosing bank advertised the property for sale to the general public after acquiring same at Sheriff's sale for many months and had only one potential purchaser therefor, i.e. William P. Mills, III; that there was no conspiracy by the bank officials and the ultimate purchasers of

the foreclosed property; and that First National Bank was happy with the terms and conditions of the sale notwithstanding that a portion of the property was included in a producing oil and gas unit many months after the bank purchased the property at the subject foreclosure proceedings.

A requirement by the court that a seizing creditor and/or the Sheriff of the Parish in which the foreclosure proceedings are being conducted should examine the title to mineral interests so as to notify all owners thereof and/or the lessee of such mineral interest is such a formidable task and complicated. The laws of the State of Louisiana pertaining to reservations of minerals and perpetuation of such ownership by the drilling of the property on which the minerals have been reserved or on property located in a Conservation Commission unit which includes the subject property, interrupts the prescription of such minerals permitting same to be separated from the land for as much as forty (40) years, or more, and perhaps long after the surface of the land has been sold or transferred numerous times. A party examing the title would not only have to go back many years to determine if mineral reservations were in fact made, but would also be required to examine records outside of the Clerk of Court's Office in which the records are located to determined whether drilling activity had taken place as suggested above, or whether units had been established by the conservation commission which would affect the subject property, and would also require an investigation of how long production from the unit or the subject property had occurred since the ten (10) year prescriptive period on minerals does not commence to run until production has ceased. Within that ten (10) year period other drilling activity may have taken place which commences the ten (10) year period once again. Numerous examples can be given of factual situations where a lease

was executed within the year of foreclosure by a prior recorded mortgage, as in the present case, but where the minerals are owned by a party totally not reflected by the public records unless a vigorous search of the records were made, perhaps forty (40) or fifty (50) years back into the chain of title, and an outside investigation also made before a final opinion can be reached. For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

WARREN D. RUSH
Rush, Rush & Calogero
2014 W. Pinhook Road, Suite 901
Post Office Box 53713
Lafayette, Louisiana, 70505
Telephone: (318) 235-2425

COUNSEL OF RECORD FOR RESPONDENTS
William P. Mills, III,
John L. Robertson, Brenda Sue Harmon Robertson, Orel Bridges, Jr., Ethyl Sue Hoffpauir Bridges

CERTIFICATE OF SERVICE

I hereby certify that pursuant ot Rules 28 and 33 of the United States Supreme Court three copies of the foregoing Respondents Opposition to Petition for Writ of Certiorari have been forwarded to each of the following attorneys representing the Peteitioners and Respondents in the litigation heretofore, to-wit:

Kai David Midboe, Esq.
David Kimmel, Esq.
Assistant Attorney Generals
Lands and Natural
Resources Divisions
7434 Perkins Road
Baton Rouge, LA 70808

Charles R. Minyard, Esq.
Magham, Hardy, Rolfs
& Abadie
666 Jefferson Street
Suite 1400
P.O. Drawer 2879
Lafayette, LA 70502

F. Henri Lapeyre, Jr., Esq.
Matthew J. Randazzo, III, Esq.
Lapeyre, Terrell, Rusch
& Randazzo
400 Poydras Street, Suite 1980
New Orleans, LA 70130-3277

Barry J. Heinen, Esq.
202 General Gardner Ave.
Lafayette, LA 70501

Thomas J. Duplantier, Esq.
Domengeaux & Wright
556 Jefferson Street
Suite 500
Lafayette, LA 70502

by depositing same in the United States Mail, postage prepaid and properly addressed, this 3rd day of October, 1989.

WARREN D. RUSH